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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of BT North America  
Petition for Waiver of Direct Access  
to INTELSAT System Restriction

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IB Docket No. 98-192  
File No. 60-SAT-ISP-97

# MEMORANDUM OPINION AND ORDER

Adopted: May 11, 2000

Released: May 16, 2000

By the Commission:

## I. Introduction

1. By this Order, we grant BT North America Inc. ("BTNA") a waiver of the restriction in the *Direct Access decision* that prohibits an INTELSAT Signatory, other than Comsat Corporation ("Comsat"), from providing Level 3 direct access service in the United States to or from any foreign country in which the Signatory or any of its affiliates use 50 percent or more of all the INTELSAT capacity consumed in that particular country.<sup>1</sup> For the reasons discussed below, we find that good cause has been demonstrated and the public interest requires that we grant BTNA a waiver of the restriction.<sup>2</sup>

## II. Background

2. On September 16, 1999, the Commission released the *Direct Access decision* that permitted Level 3 direct access to the INTELSAT system from the United States for the provision of

<sup>1</sup> *In the Matter of Direct Access to the INTELSAT System*, Report and Order, FCC 99-236, 14 FCC Rcd 15703 (1999) ("*Direct Access decision*").

<sup>2</sup> The Open Market Reorganization for the Betterment of International Telecommunications (the ORBIT Act), Pub. Law 106-180, 114 Stat. 48 (2000), enacted on March 17, 2000, provides that users and providers of telecommunications services shall be permitted to obtain Level 3 direct access to INTELSAT. The ORBIT Act, however, does not legislate all aspects of the Commission's *Direct Access decision* – including the requirement that direct access customers pay Comsat a surcharge and the restriction on foreign signatory direct access in the U.S. market. See *Direct Access decision*, 14 FCC Rcd at 15733 and 15741. Provisions similar to these conditions appeared in previous bills passed by either the House or the Senate. The ORBIT Act mandates Level 3 direct access as implemented by INTELSAT without imposing any conditions. To the extent that issues are raised as to whether the conditions imposed by the *Direct Access decision* should be maintained in view of the ORBIT Act, the Commission may consider these issues in ruling upon petitions that have been filed by various parties seeking reconsideration of these conditions.

international satellite services.<sup>3</sup> Previously, users of INTELSAT space segment capacity from the United States were required to obtain access to INTELSAT satellites only through Comsat. In permitting Level 3 direct access, however, the Commission restricted direct access availability in the United States by dominant foreign INTELSAT Signatories and their affiliates, which includes British Telecommunications plc ("BT")<sup>4</sup> and BTNA.<sup>5</sup> Specifically, the Commission stated that it would not authorize any Signatory, other than Comsat, to purchase direct access in the United States for service to or from any specific foreign country in which the Signatory itself uses 50 percent or more of all INTELSAT capacity consumer in that country.<sup>6</sup> The Commission applied this restriction to affiliates that are more than 50 percent owned by the respective Signatory.

3. The Commission adopted the dominant foreign Signatory restriction to protect against the potential of dominant foreign INTELSAT Signatories to support INTELSAT Utilization Charge ("IUC") rates at below cost levels -- levels that do not reflect INTELSAT's full costs of providing direct access in the U.S. market.<sup>7</sup> It noted that dominant foreign Signatories might find that below-cost IUC prices are in their economic interest. Because these same companies have the ability to influence IUC rates by way of their Signatory status (and thus Level 3 direct access prices in the United States), "they may be able to then offer their U.S. services at artificially low prices, which could have an adverse competitive impact on Comsat and other international service providers operating in the United States."<sup>8</sup>

4. In its Petition for Waiver, BTNA first asserts that BT has no economic incentive to support IUC rates at below cost levels and, therefore, "would not initiate or support" such an effort.<sup>9</sup> It maintains that "since all INTELSAT users are charged the same IUC rates, BT would gain no competitive advantage in the United States or elsewhere," because every direct access user would obtain the same benefit from reduced rates.<sup>10</sup> Further, "since BT is an investor, it would suffer lower investment returns due to below-cost IUC's, placing BT in a disadvantageous position vis-à-vis users

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<sup>3</sup> "Direct access" refers to the means by which users of the INTELSAT system may obtain space segment capacity directly from INTELSAT rather than going through an INTELSAT Signatory. See *Direct Access decision* at 15707 for a description of the four levels of direct access available from INTELSAT, including Level 3 direct access.

<sup>4</sup> British Telecommunications plc is the INTELSAT Signatory for the United Kingdom and the parent corporation and 100 percent owner of BT North America.

<sup>5</sup> *Direct Access decision* at 15742-43. The use of the term "dominant" in this context refers to Signatories or affiliates that use at least 50 percent of the INTELSAT capacity consumed in a particular country.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 15742-44 "IUC rates are charges for use of space segment capacity determined by the INTELSAT Board of Governors and published in the INTELSAT Tariff Manual. IUC rates are based on factors such as beam coverage, spectrum capacity or data rates, and lease periods. All INTELSAT Signatories and direct access users pay the same IUC rates, as applicable.

<sup>8</sup> *Id.* at 15742.

<sup>9</sup> BT North America Inc. Petition for Waiver, IB Docket No. 98-192 (Nov. 18, 1999) ("BTNA Petition") at 3.

<sup>10</sup> *Id.* at 4.

that do not invest or whose investment shares do not exceed their utilization shares.”<sup>11</sup> BTNA also states that BT could not recoup investment losses if IUC rates were reduced to below cost levels either (a) in its home market, because of competitive pressures there, or (b) in the U.S. market, because of existing satellite services competition, including Level 3 direct access competition, which would also preclude it from raising prices on any of its satellite services. These losses, asserts BTNA, would be exacerbated by the notable amount by which BT’s investment share exceeds its underlying utilization share.<sup>12</sup> This is due to the fact that BT would receive a lower return on its investment as a result of, not only its own use of direct access, but any other company obtaining direct access to INTELSAT within the United States.<sup>13</sup>

5. Secondly, BTNA argues that the underlying purpose of the dominant foreign Signatory restriction -- to counteract the potential incentive of foreign INTELSAT Signatories to depress IUC rates to below cost levels, in order to ensure effective competition in the U.S. direct access market<sup>14</sup> -- is not served, but frustrated when applied to BTNA.<sup>15</sup> BTNA states that restricting its direct access involvement in this way actually frustrates “the Commission’s purpose of encouraging competition in the U.S. direct access market by precluding a potential competitor from competing on equal terms for the business of retail customers in the United States.”<sup>16</sup>

6. Finally, while BTNA contends that the above reasons alone justify a grant of its waiver request,<sup>17</sup> nevertheless, BT and BTNA also promise “not [to] initiate or support any proposal to the INTELSAT Board of Governors advocating the reduction of” IUC to below cost levels, unless it is required to do so by other parties (e.g., United Kingdom (“U.K.”) Government) in its role as U.K. Signatory.<sup>18</sup>

7. Comsat opposes the BTNA waiver request because, it argues, BT and BTNA “are not uniquely situated such that a waiver of the Commission’s” restriction would be appropriate.<sup>19</sup> It states that BTNA’s arguments are applicable to all Signatories and, thus, more appropriately addressed in a petition for reconsideration.<sup>20</sup> Secondly, Comsat argues that lower IUC rates could give BT and BTNA a

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<sup>11</sup> *Id.* at 5-6.

<sup>12</sup> *Id.* at 4-5.

<sup>13</sup> *Id.*

<sup>14</sup> *See Direct Access decision* at 15742-43. *See also* BTNA Petition at 2-3.

<sup>15</sup> BTNA Petition at 2.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 17-18.

<sup>19</sup> Opposition of Comsat Corporation to BT North America Inc. Petition for Waiver, IB Docket No. 98-192 (Dec. 6, 1999) (“Comsat Opposition”) at 4.

<sup>20</sup> *Id.* at 3-4

competitive advantage in the United States, in light of its ability to influence IUC prices.<sup>21</sup> Thirdly, Comsat expresses skepticism regarding BTNA's commitment that BT will not support below cost reductions in IUC rates, since it is not clear how this promise will be enforced.<sup>22</sup> Comsat states that this commitment does not cover the situation where INTELSAT's costs rise but IUC rates do not.<sup>23</sup> Finally, Comsat asserts that allowing access by dominant foreign Signatories would "derail INTELSAT privatization" efforts because the incentive to support privatization would disappear.<sup>24</sup>

### III. Discussion

8. Commission rules allow for a waiver where good cause is shown.<sup>25</sup> "The Commission may grant a waiver where special circumstances warrant a deviation from the general rule, such deviation serves the public interest, and the waiver is consistent with the principles underlying the rule."<sup>26</sup> In reviewing the Commission's waiver rule, the United States Court of Appeals has stated that granting a waiver may be appropriate if (1) unique circumstances support a finding that strict adherence would not be in the public interest; and (2) where a grant would not undermine the underlying policy objectives of the rule in question.<sup>27</sup> The Court further stated, that although "an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, [this] does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases."<sup>28</sup>

9. In this case, BTNA has shown good cause by demonstrating that the public interest does not require strict adherence to the dominant foreign Signatory restriction under the circumstances presented here.<sup>29</sup> We also conclude that the underlying policy objectives for the restriction -- to offset

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<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2.

<sup>25</sup> 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.").

<sup>26</sup> See In the Matter of 1998 Biennial Regulatory Review -- Review of Depreciation Requirements for Incumbent Local Exchange Carriers, CC Docket No. 98-137, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et. al. CC Docket No. 99-117, GTE Telephone Operating Companies Release of Information Obtained during Joint Audit AAD File No. 98-26, Further Notice of Proposed Rulemaking, FCC 00-119, 2000 WL 339773 (F.C.C.) (rel. April 3, 2000) at note 8 (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied 409 U.S. 1027 (1972) ("*Wait Radio*").

<sup>27</sup> *Wait Radio*, 418 F.2d at 1157.

<sup>28</sup> *Id.*

<sup>29</sup> We note that BT and BTNA need not necessarily be uniquely (exclusively) situated to satisfy the waiver standard, it is only necessary that unique circumstances relative to the particular restriction are present.

any potential incentive for dominant foreign Signatories to depress IUC rates to below cost levels, resulting in an anti-competitive impact to the U.S. direct access market<sup>30</sup> -- will not be undermined by granting BTNA's request. We make this finding based on the specific showing of BTNA as to the competition faced by BT as an INTELSAT Signatory. Other Signatories that may seek similar relief in the future would have to make showings based on their particular circumstances.

10. **Special Circumstances.** There are four reasons for concluding that special circumstances support grant of a waiver here and that it would serve the public interest. First, BT has promised not to initiate or support any proposal to the INTELSAT Board of Governors that advocates the reduction of IUC rates to below cost levels, unless it is required to do so (by parties that retain control over it) in its role as INTELSAT Signatory to the United Kingdom.<sup>31</sup> This commitment directly addresses the concerns for which the restriction was put in place. While Comsat raises the possibility that INTELSAT's cost might rise but a Signatory would oppose an increase in IUC rates, BT's commitment not to support below cost IUC rates addresses this hypothetical concern.

11. Second, BT and BTNA face significant competition, including price competition, which would create an incentive for it to oppose below cost IUC rates. Any reduction in the IUC rate to a below cost level would immediately be available to all of BT's competitors who are able to obtain direct access in the U.K. and in the U.S. Thus, BT would not be able to obtain any advantage over its competitors by being able to use INTELSAT at a rate lower than its competitors, unlike a signatory that operated in a country with few or no competitors able to take advantage of direct access and reduced IUC rates.

12. In the U.K. market, BT and BTNA face competition from: (1) 23 Level 4 customers, 9 of which are U.S.-owned companies, including 2 Comsat subsidiaries;<sup>32</sup> (2) non-INTELSAT satellite systems that serve the U.S.-U.K. route, including PanAmSat, Columbia, Telecom2, and Loral Orion;<sup>33</sup> (3) transatlantic undersea cables, particularly on major Signatory country routes;<sup>34</sup> and (4) Internet and broadband competition at U.K. teleports, GlobeCast, North Europe, Kingston/TLI, and Satellite Media Services. This level of competition, which Comsat does not dispute, has compelled BT to reduce prices for satellite services in its home market in order to remain competitive.<sup>35</sup> In the U.S. market, BT and BTNA would face competition in the retail market from U.S. carriers that include: AT&T, MCI WorldCom, GE Americom, PanAmSat, Loral Space and Communications, and other Level 3 direct access users.<sup>36</sup> We believe these competitive pressures would require BT and other Level 3 direct access

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<sup>30</sup> See *Direct Access decision* at 15742-43.

<sup>31</sup> BTNA Petition at 17-18.

<sup>32</sup> BT also specifies how its share and utilization have decreased while the share and utilization of Level 4 investors has grown. See *id.* at 5-9.

<sup>33</sup> *Id.* at 9-10.

<sup>34</sup> See *id.* at 10-11. BTNA notes that with respect to the U.S.-U.K. route, it uses INTELSAT primarily to provide occasional-use video due to the lower prices for sending voice and data traffic by cable.

<sup>35</sup> See *id.* at 12. Comsat does not dispute BTNA's assertions on the level of competition.

<sup>36</sup> See BTNA Reply at 6.

users to pass on any apparent “windfall” from below cost IUC rates to their retail customers.<sup>37</sup> Comsat does not explain why this would not occur.

13. Thus, given the level of competitiveness present in the U.K. and U.S. markets, we believe BT would have little incentive to act in a manner that might harm competition in the U.S. market by supporting below cost IUC rates. We conclude that given the particular competitive pressures faced by BT, if IUC rates were reduced to below cost levels: (1) all direct access users would benefit from lower IUC rates; (2) BT’s return on investment would be reduced; and (3) it would not be able to recoup its reduced return. Any attempt by BT to raise retail prices above the current level, in order to recoup investment losses, would result in it suffering financially in both its home and the U.S. markets. All Level 3 direct access users in the United States are charged the same IUC rates. Any lowering of rates to below cost levels would benefit other Level 3 direct access users more because they would not be affected by a lower investment return.<sup>38</sup> Likewise, BT’s losses would be exacerbated by the amount by which BT’s investment share exceeds its underlying utilization share. BT would, in effect, be “subsidizing all investors whose utilization shares exceed their investment shares.”<sup>39</sup> Comsat’s opposition fails to consider competition from other direct access users and also assumes that below cost IUC rates would rival the costs of other service providers.<sup>40</sup> In addition, as stated above, Comsat’s argument of windfall gains from the sale of below cost space segment fails to show that competitive forces would not require BT and other Level 3 direct access users to pass this alleged “windfall” on to their retail customers.<sup>41</sup>

14. Third, in the case of BTNA, the dominant foreign Signatory restriction would frustrate the Commission’s purpose of encouraging competition in the U.S. direct access market. Specifically, the restriction would foreclose both U.S. and U.K. consumers from benefiting from likely lower prices for the services described in its petition due to the increased competition.<sup>42</sup> Hence, as long as IUC rates are not below cost, and given the competitive nature of the U.S.-U.K. route (especially given the significant competition from undersea cables), including the significant competition BT faces in its home market and would face in the U.S. market, allowing another U.S.-U.K. competitor would promote competition and be in the public interest.<sup>43</sup>

15. Comsat asserts that BTNA’s arguments are applicable to all Signatories and therefore are

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<sup>37</sup> *Id.* at 7.

<sup>38</sup> See BTNA Petition at 13. BTNA notes that “[l]owered IUC rates would benefit (in effect, subsidize) Level 3 direct access users that would not be affected by lower investment returns, at the expense of Signatories and Level 4 users that would be harmed by these lower investment returns.” *Id.* at 4.

<sup>39</sup> See BTNA Reply at 4. Contrary to Comsat’s contention, BT would be subsidizing three of the four Level 4 direct access users in the U.K. because their utilization shares significantly exceed their investment shares.

<sup>40</sup> See Comsat Opposition at 6-7.

<sup>41</sup> See BTNA Reply at 7.

<sup>42</sup> See *id.* at 8.

<sup>43</sup> Comsat has made no attempt to demonstrate that a waiver would not be in the public interest.

more appropriately addressed in a petition for reconsideration.<sup>44</sup> We do not agree. As noted above, BT has pledged not to support below cost IUC rates. No other Signatory has made a similar pledge. Moreover, BT faces significant competition in its home market and would face the same in the U.S. market. Of course, the possibility that some of BTNA's arguments may be relevant to other similarly situated entities does not foreclose the grant of a waiver request. A waiver is available to any party that demonstrates good cause. BTNA has presented a case that demonstrates why a waiver is justified while no other party has requested a waiver or petitioned for reconsideration on this issue. In light of the commitment to not support below cost IUC rates and the apparent lack of incentives to do otherwise, we believe a waiver is warranted.

16. **Underlying Principles.** We likewise conclude, for the reasons discussed above, that the underlying policy objectives for the dominant foreign Signatory restriction -- to eliminate any potential incentive for foreign Signatories to depress IUC rates to uneconomically low levels, which could have an adverse competitive impact on the U.S. direct access market<sup>45</sup> -- are not undermined by the grant of a waiver in this instance.<sup>46</sup> We emphasize that concerns regarding adherence to the Commission's underlying policy objective are primarily alleviated by the BT and BTNA commitment, as expressed by BTNA, "not [to] initiate or support any proposal to the INTELSAT Board of Governors advocating the reduction of the INTELSAT utilization charge ("IUC") to" below cost levels, discussed above.<sup>47</sup> Notwithstanding the apparent lack of an economic incentive to support below cost IUC rates, this commitment assures us that the underlying policy objective for dominant foreign Signatory restriction will not be undermined.<sup>48</sup> To the extent Comsat is arguing that BT's alleged (would-be) competitive advantage will influence it to support below cost IUC rates, we do not agree for the reasons already stated above. Comsat does not explicitly state how BT would gain this advantage. It implies but does not offer support that below cost IUC rates would put BT in a better competitive position than other non-INTELSAT-related satellite service providers, such as PanAmSat, and Comsat. We believe, however, the BT and BTNA commitment and the condition we place on our grant of this waiver request makes Comsat's argument unconvincing.

#### IV. Conclusion and Ordering Clauses

17. For the foregoing reasons, we conclude that good cause has been shown and the public interest is served by granting BTNA a waiver of the Commission's direct access dominant foreign Signatory restriction.

18. Accordingly, IT IS ORDERED, that the petition for waiver filed by BT North America

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<sup>44</sup> Comsat Opposition at 3-4. Comsat states that "BT and BTNA are not uniquely situated such that a waiver of the Commission's requirement would be appropriate relief."

<sup>45</sup> See *Direct Access decision* at 15742-43.

<sup>46</sup> BT North America Inc. Reply to Opposition to Petition for Waiver, IB Docket No. 98-192 (Dec. 16, 1999) ("BTNA Reply") at 2. Comsat did not rebut the contention that the Commission's underlying purpose for the restriction is not served, but frustrated with respect to BT and BTNA.

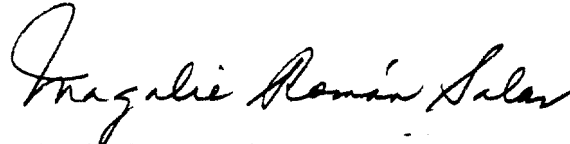
<sup>47</sup> *Id.*

<sup>48</sup> See *id.* at 18.

Inc., pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, IS GRANTED.

19. IT IS FURTHER ORDERED, that this Order is effective on release.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Magalie Roman Salas". The signature is written in a cursive, flowing style.

Magalie Roman Salas  
Secretary